

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

MCGINN, SMITH & CO., INC.;  
MCGINN, SMITH ADVISORS LLC;  
MCGINN, SMITH CAPITAL HOLDINGS CORP.;  
FIRST ADVISORY INCOME NOTES, LLC;  
FIRST EXCELSIOR INCOME NOTES, LLC;  
FIRST INDEPENDENT INCOME NOTES, LLC;  
THIRD ALBANY INCOME NOTES, LLC;  
TIMOTHY M. MCGINN; AND  
DAVID L. SMITH,

1:10-CV-457  
(GLS/RFT)

Defendants and

LYNN A. SMITH,

Relief Defendant.

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**PROPOSED INTERVENOR'S MEMORANDUM OF LAW IN SUPPORT OF MOTIONS  
TO INTERVENE AND FOR A LIFT OF THE TEMPORARY RESTRAINING ORDER**

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Dated: November 3, 2010

Yours, etc.,

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& CATALINOTTO, LLP**  
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### **PRELIMINARY STATEMENT**

Proposed Intervenor CIT Lending Services Corporation (“CIT”) seeks permission to intervene in this action, pursuant to FED. R. CIV. P. 24(a), for the limited purpose of seeking relief from the Honorable Lawrence Kahn, Senior District Court Judge’s April 20, 2010 Temporary Restraining Order (“TRO”), which has prevented it from prosecuting a foreclosure action in state court against, *inter alia*, Defendant Third Albany Income Notes, LLC.

As explained more fully below, Proposed Intervenor is the principal mortgagee on property to which Defendant Third Albany Income Notes, LLC, is a junior mortgagee, with rights wholly subordinate to Proposed Intervenor’s. Prior to the initiation of this federal action, CIT initiated an action in state court to foreclose on property located at 74 State Street in Albany, New York. Defendant Third Albany Income Notes, LLC is also a defendant in that action. However, that state action has been upheld because of the aforementioned TRO, which protects all Third Albany Income Notes’ proprietary interests, including those interests subordinate to Proposed Intervenor’s in the state foreclosure action.

Therefore, CIT seeks permission to enter this action for the limited purpose of obtaining relief from the TRO.

### **STATEMENT OF FACTS**

On March 10, 2010, Proposed Intervenor initiated a foreclosure proceeding against State Street Hospitality, LLC, 74 State, LLC, George Shannon, Gary D. Smith, Third Albany Income Notes, LLC, and John Doe and Mary Roe, by filing summonses and complaints in New York State Supreme Court, Albany County. Benjamin W. Hill, Esq., Aff., dated Nov. 3, 2010, Ex. A, Summons and Verified Compl., dated Mar. 10, 2010. CIT is the plaintiff and principal mortgagee in the aforementioned foreclosure action. *Id.*, Ex. B, Promissory Note, dated Dec. 28,

2007. Defendant Third Albany Income Notes, LLC, is a junior mortgagee on the property at issue in the foreclosure action, with rights subordinate to those of CIT. *Id.*, Ex. C, Mortgage Foreclosure Guarantee, dated Jan. 7, 2010, Schedule B; Ex. D, Subordination Agreement.

On March 24, 2010, Defendant Third Albany Income Notes, LLC, was duly served with process in the foreclosure action. *Id.*, Ex. E, Proof of Service, dated Mar. 24, 2010. On March 30, 2010, Defendant Third Albany Income Notes, LLC, filed a notice of appearance in the foreclosure action. *Id.*, Ex. F, Notice of Appearance, dated Mar. 30, 2010. Defendant Third Albany Income Notes, LLC, has not filed an answer or any other opposition to Proposed Intervenor's Complaint in the foreclosure action, and its time to do so lapsed on April 19, 2010. *See* N.Y.C.P.L.R. § 3012(a).

On April 20, 2010, Judge Kahn issued a TRO freezing Defendants' assets in this federal action and enjoining any person or entity from taking "any action without further order of this Court to interfere with the taking[,] control, possession, or management of the [Defendants'] assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order." Dkt. No. 5, Order, dated Apr. 20, 2010, at p. 21 (Part XVIII). On or about May 20, 2010, Proposed Intervenor received a copy of the TRO from Allan L. Hill, attorney for the receiver in this federal action. Hill Aff. at ¶ 10. On July 7, 2010, the Honorable David R. Homer, United States Magistrate Judge for the Northern District of New York, issued an Order granting in part Plaintiff's Motion for a Preliminary Injunction in this federal action, maintaining the freeze on Defendants' assets as stipulated in Judge Kahn's TRO. Dkt. No. 86.

Judge Kahn's TRO has prevented CIT from prosecuting its foreclosure action in state court. It is respectfully submitted that, given Proposed Intervenor's superior proprietary interests

in the mortgaged property at issue in the foreclosure action, there is no reason why its request for relief from Judge Kahn's TRO should not be granted.

**POINT I**

**PROPOSED INTERVENOR IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO FED. R. CIV. P. 24(a)**

FED. R. CIV. P. 24(a) allows any person or entity to intervene as a matter of right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest."

The Second Circuit has held that a person or entity seeking to intervene in an action pursuant to FED. R. CIV. P. 24(a) must: "(1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (footnotes and citations omitted).

Proposed Intervenor CIT Lending Services Corporation has clearly met the above criteria in this action. As to timeliness, the Second Circuit directs that such determination is within the broad discretion of the court, which should consider "(1) how long the applicant had notice of the interest before [it] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *Id.* at 84 (citations omitted).

CIT was put on notice of Judge Kahn's TRO on or about May 20, 2010. Hill Aff. at ¶ 10. Given that the Court did not rule on Plaintiff's Motion for a Preliminary Injunction until July 7, 2010, and given also that the relief the Proposed Intervenor seeks concerns property to which

none of the parties have a primary interest, there would be little prejudice to the existing parties were the present Motion to Intervene granted. Dkt. No. 86. On the other hand, should the Court deny intervention, CIT's foreclosure action would be paralyzed until such time as this federal matter is resolved, which, given its complexity and the likelihood of more appeals, could be an event that occurs well into the future, thereby severely prejudicing the Proposed Intervenor. Thus, in consideration of the above factors, the Motion is timely.

Secondly, CIT's interest in this litigation, while tangential to the fraud allegations brought against the Defendants, could not be clearer. Judge Kahn's April 20, 2010 TRO has enjoined CIT from taking "any action without further order of this Court to interfere with the taking[,] control, possession, or management of the [Defendants'] assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order." Dkt. No. 5 at p. 21. Given that sweeping mandate, CIT cannot prosecute its foreclosure action in which it is the principal mortgagee. Hill Aff. at ¶¶ 3-4, Exs. A-B. As such, CIT's interests have already been impaired by the TRO and will continue to be until it is lifted. Finally, there is no other party in this federal action that has or will represent the interests of CIT, whose proprietary interests are entirely separate and distinct from those of any other party to this federal action.

Courts have held that "interveners of right need only an interest in the litigation—not a cause of action or permission to sue." *Hoblock v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 100 (N.D.N.Y. 2005) (internal citations and quotation marks omitted). In this case, CIT's interest in this federal action was occasioned by the TRO which has prevented it from prosecuting a foreclosure action and thereby from repossessing property to which it is legally entitled. Such interest is sufficient to justify its intervention as a matter of right. *See id.* at 100

(finding that “a protectable interest alone, even apart from any actual claim or the ability to file a separate action, may be sufficient for a court to grant intervention under Rule 24(a)”).

Therefore, it is respectfully submitted that Proposed Intervenor should be granted permission to intervene for the limited purpose of seeking relief from the TRO.

## POINT II

### **THE TEMPORARY RESTRAINING ORDER SHOULD BE LIFTED AS TO CIT’S FORECLOSURE ACTION AGAINST THIRD ALBANY INCOME NOTES, LLC.**

As previously discussed, CIT is the principal mortgagee in a foreclosure action currently pending in Albany County Supreme Court. Hill Aff. at ¶¶ 3-4, Exs. A-B. Defendant Third Albany Income Notes is the junior mortgagee on the property in question in said foreclosure action, with rights wholly subordinate to CIT’s. *Id.* at ¶ 5, Ex. C. The only thing preventing CIT from prosecuting its foreclosure action is the aforementioned TRO in this action. Dkt. No. 5.

Lifting the TRO, to the extent that it inhibits CIT’s foreclosure action, would not in any way affect this federal action; rather, it would simply allow CIT the freedom to pursue its legal and proprietary interests. The fact that First Albany Income Notes has not filed any opposition to CIT’s complaint in the foreclosure action is indicative of its subordinate position and of CIT’s clear right to foreclose on the property at issue in the state proceeding. To the extent that First Albany Income Notes seeks to protect its secondary interests in that property, it may do so in the state court action.

In sum, CIT’s interests have been impaired and the Court’s restoration of those interests would not have any negative effect on this federal litigation or the parties thereto. Therefore, it is respectfully requested that the CIT’s Motions to Intervene and for a Lift of the TRO be granted.

**CONCLUSION**

Proposed Intervenor seeks permission to intervene in this action for the limited purpose of seeking relief from the TRO, which has effectively prevented it from duly prosecuting its foreclosure action in state court. Proposed Intervenor's proprietary interests in the foreclosure action are superior to those of Third Albany Income Notes and, as such, CIT should not be precluded from pursuing its foreclosure action. Finally, Proposed Intervenor's interests are tangential to those at issue in this federal action and, therefore, allowing it to intervene and seek relief from the TRO would have a negligible overall effect on this federal action and prejudice no party to it.

Dated: November 3, 2010

Yours, etc.,

**MAYNARD, O'CONNOR, SMITH  
& CATALINOTTO, LLP**

s/Benjamin W. Hill

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